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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SANDRA SHEWRY, as Director of Health Services, etc., Plaintiff and Respondent, v. JULIO O'LACO, Defendant and Appellant.	B189186 (Los Angeles County Super. Ct. No. SC083878)

APPEAL from a judgment of the Superior Court of Los Angeles County. Valerie Baker, Judge. Modified and affirmed.

Cotkin, Collins & Ginsburg and Robert G. Wilson for Defendant and Appellant.

Bill Lockyer, Attorney General of the State of California, Thomas Yanger, Senior Assistant Attorney General, John H. Sanders, Lead Supervising Deputy Attorney General, Richard T. Waldow, Supervising Deputy Attorney General, and Gregory M. Cribbs, Deputy Attorney General, for Plaintiff and Respondent.

Julio P. O'Laco appeals a judgment entered in favor of Sandra Shewry, Director of the California Department of Health Services (the Department), setting aside the fraudulent transfer of real property to his two children, Julia Valdez (Julia) and Carl A. O'Laco (Carl), and ordering him to "take all necessary steps to effect the retransfer of the real property back into his name . . . ." Appellant contends that the trial court lacked jurisdiction to enter judgment due to the absence of Julia and Carl, whom he deems indispensable parties. We disagree, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was a health care provider who billed the Medi-Cal program, administered by the Department, for services provided to Medi-Cal beneficiaries. In 2001, the Department conducted an audit of appellant's Medi-Cal provider numbers pursuant to Welfare and Institutions Code section 14087.1. The audit established that appellant obtained overpayments from the Medi-Cal program in excess of $2,000,000. Welfare and Institutions Code section 14107.11 authorizes the Department to recover these Medi-Cal overpayments.

Appellant was first notified in writing of the overpayments in November of 2001. At that time, he owned certain real property located at 13600 Marina Pointe Drive, #1207, Marina del Rey, California (the Property). The next year, appellant transferred the Property by intra-family transaction deed to Julia and Carl.

In April of 2003, the Department filed a Certificate of Health Care Provider Overpayment against appellant in an action entitled *California State Department of Health Services v. Julio P. Olaco aka Jules O'Laco,* Sacramento County Superior Court Case No. 03CS00688. A judgment was entered against appellant in favor of the Department. An abstract of judgment was subsequently recorded in Los Angeles County in the amount of $2,376,234.81. By virtue of that judgment, the Department acquired a judgment lien on appellant's real property.

On December 22, 2004, the Department filed its Complaint to Set Aside Fraudulent Transfer; For Temporary Restraining Order, Preliminary and Permanent

Injunctions; and Other Equitable Relief (the Complaint) against appellant, Julia and Carl. The primary relief sought was an order that the transfer of the Property from appellant to his children be declared void and set aside as to the Department in order that it may satisfy its lien.

On March 4, 2005, appellant answered the Complaint and asserted various affirmative defenses. On March 28, 2005, Carl answered the Complaint and asserted various affirmative defenses. On May 4, 2005, the Department dismissed Julia. On September 14, 2005, the Department dismissed Carl.[1]

The matter was tried to the court on October 24, 2005. In addition to several employees of the Department, both appellant and Carl testified at the trial. After taking the matter under submission, the trial court found that the Department met its "burden of showing a fraudulent transfer by the Defendant Julio Olaco aka Julio O'Laco in violation of Civil code Section 3439.04." Judgment was entered on December 2, 2005, with a finding that the transfer of the Property "was fraudulent and in violation of Civil Code section 3439.04, and therefore is void." Appellant timely appealed the judgment.

CONTENTION

Appellant makes a single assignment of error on appeal. He contends that Julia and Carl, the record owners of the Property, are indispensable parties to this litigation; that in their absence, the trial court was without jurisdiction to act; and the judgment is consequently null and void.

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[1] While the Department states in its brief that Julia was dismissed because she lives out of state and the Department was unable to locate and serve her, and that Carl was dismissed "at the urging of his attorney and after he signed a declaration under penalty of perjury that he would not attempt to sell or place in escrow the Marina Del Rey Property," these "facts" do not appear in our record.

DISCUSSION

We agree with appellant's assessment that because "the issue presented is one of law, based upon undisputed facts, this Court's review will be conducted de novo." (See, e.g., *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

As appellant argues, "Where the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined, that person is an indispensable party." (*Sierra Club, Inc. v. California Coastal Comm'n.* (1979) 95 Cal.App.3d 495, 500.) Appellant continues: "Where the party is indispensable because the court is adjudicating that party's rights, the court is without jurisdiction to do so in the absence of the party. E.g., *Beyerbach v. Juno Oil Co*., 42 Cal.2d 11, 27-28, *appeal dismissed*, 347 U.S. 985, 74 S.Ct. 853, 98 L.Ed. 1120 (1954) (court is without jurisdiction to adjudicate rights of absent corporate defendant and action must be dismissed as to all other defendants); *Sanders v. Fuller*, 45 Cal.App.3d 994, 995 (1975) ('It is the essence of the indispensable party concept that the court is without jurisdiction to proceed until the indispensable party is brought into the action.') (citations omitted.) Further, . . . this issue may be raised for the first time on appeal. E.g., *Covarrubias v. James*, 21 Cal.App.3d 129, 124 (1971)." While the foregoing may have been a correct statement of the law 30 years ago, it is no longer accurate.

Prior to the 1971 revision to Code of Civil Procedure section 389, an "indispensable party" was one who had to be joined in order that the court might proceed with the case. Such a person's interest in the subject matter was such that final judgment could not be rendered without him. The objection was not merely one of lack of jurisdiction of the absent party; the court could not even proceed to adjudicate the rights of the parties before it because personal jurisdiction over an indispensable party was necessary for jurisdiction of the subject matter. (See *Bank of California Nat'l Ass'n v. Superior Court* (1940) 16 Cal.2d 516, 522.) Thus, in an action to set aside a fraudulent conveyance, all persons claiming a present interest in the property had to be joined in order for the court to acquire subject matter jurisdiction of the matter. (See *Heffernan v. Bennett & Armour* (1952) 110 Cal.App.2d 564, 586.)

In 1971, the Legislature amended section 389 to conform to the Federal Rules of Civil Procedure. Rule 19 of the Federal Rules, concerning compulsory joinder, describes "persons to be joined if feasible." If such a person can be made a party, the court will order the person joined. If the person cannot be made a party, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Thus, revised section 389, effective July 1, 1972, limits compulsory joinder to situations in which the absence of a person (a) would prevent complete relief among the existing parties, or (b) might result in substantial prejudice to the absent person or to the parties before the court. (Cal. Law Rev. Com. 1970 Report, p. 501 et seq.)

As a consequence of these revisions, "'a person is regarded as indispensable only in the conclusory sense that, in his absence, the court has decided the action should be dismissed.'" (4 Witkin, California Procedure (4th ed. 1997), Pleading § 165, p. 223.) Where, as here, the decision was to proceed, "'the court has the power to make a legally binding adjudication between the parties properly before it.'" (*Ibid*.) Thus, failure to join an "indispensable party" is not a "jurisdictional defect" as appellant contends, and does not render the court's judgment a nullity.

Rather, although the court has no jurisdiction over the absent parties, and its judgment cannot bind them, the court does have jurisdiction over the parties before it and has the power to enter a judgment affecting their interests. "It is for discretionary and equitable reasons, not for any want of jurisdiction, that the court may decline to proceed without the absent party." (*Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 368.) This view has been endorsed by subsequent appellate courts. "We concur with the conclusion of the *Kraus* court that section 389 does not now provide, and never has provided, that the absence of an indispensable party deprives a court of subject matter jurisdiction. Rather, the decision whether to proceed with that action in the absence of a particular party is one within the court's discretion, as governed by the various factors enumerated in subdivision (b) of section 389, Code of Civil Procedure."

(*Sierra Club Inc. v. California Coastal Commission, supra,* 95 Cal.App.3d at p. 500; see also *People ex rel Lungren v. Community Redevelopment Agency* (1997) 56 Cal.App.4th 868, 876; *Ursino v. Superior Court* (1974) 39 Cal.App.3d 611, 616; *Bank of Orient v. Superior Court* (1977) 67 Cal.App.3d 588, 595.)

In short, defendant is simply wrong when he states that the court was without jurisdiction to enter judgment in this case.

We note as well that appellant raises the issue of compulsory joinder for the first time on appeal. Under the pre-1972 law, this assignment of error could be raised for the first time on appeal, for the simple reason that a court's lack of jurisdiction may be raised at any time. However, as we explain above, the absence of the record owners of the property did not deprive the trial court of jurisdiction. As the post-1972 cases explain, a claim of error in failing to join an indispensable party is not cognizable on appeal unless it is raised in the trial court or there is some compelling reason of equity or policy which warrants belated consideration. (*Jermstad v. McNelis* (1989) 210 Cal.App.3d 528, 538; see also *Kraus v. Willow Park Gold Course*, *supra*, 73 Cal.App.3d 354, 363-371; 4 Witkin, Cal. Procedure, *supra*, Pleading, § 167.)

Appellant presents no compelling reason of equity or policy which would warrant our consideration of the joinder issue for the first time on appeal. Although both Julia and Carl were named as defendants in the lawsuit, and Carl was served with and answered the complaint, appellant made no objection to their dismissal from the action. Indeed, Carl O'Laco testified at trial, conceded that his interest in the Property was acquired by gift from his father, and never suggested that there was any reason the trial court ought not dispose of his asset. Accordingly, we decline to consider the issue.

Finally, appellant raises a new argument in his reply brief: "The judgment against Dr. O'Laco is a nullity because it can accomplish nothing in the absence of the transferees of the real property." We deem the argument waived. (*Reed v. Mutual Service Corp*. (2003)106 Cal.App.4th 1359, 1372, fn. 11 ["Fairness militates against our consideration of any argument an appellant has chosen not to raise until its reply brief, and the authorities holding to that effect are numerous"].) Moreover, while a judgment which

accomplishes nothing may reasonably be termed a "nullity," appellant cites no authority to the effect that an appellate court may reverse a judgment entered by a court of competent jurisdiction in the absence of legal error. What's more, if the judgment is ineffectual, we question whether appellant is an aggrieved party with standing to appeal. (See Code Civ. Proc., § 902.)

In any event, the judgment is not ineffectual. Rather, the effect of the judgment is to void the transfer from appellant to his children for the sole purpose of permitting the Department to satisfy its judgment lien. For this limited purpose, " . . . title to [the] property conveyed . . . remains in the fraudulent grantor, which the creditor may seize, . . ." (*Allee v. Shay* (1928) 92 Cal.App. 749, 759; see also *Hansen v. Cramer* (1952) 39 Cal.2d 321.) Civil Code section 3439.07, subdivision (a)(2) specifically provides that the Property is subject to attachment, while subdivision (a)(3)(A) of that section authorizes "An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or its proceeds." And section 3439.07, subdivision (c) makes clear that, as a judgment creditor, the Department "may levy execution on the asset transferred or its proceeds." This is, no doubt, precisely what the Department intends to do with the judgment.

The dissent concludes that the judgment rendered is "ineffectual" and would reverse it for that reason.

The judgment states: "The transfer of [the Property], which occurred on or about September 4, 2002, was fraudulent and in violation of Civil Code section 3439.04, and therefore is void." By that language, the trial court determined appellant's ownership interest in the Property vis-à-vis the Department. It did not address the ownership interests of Julia and Carl. As we explain above, the Department is free to seek a writ of execution on the Property to satisfy its judgment lien. Julia and Carl may oppose the writ and offer any defenses they may have, such as, for example, that they are bona fide purchasers for value.

In addition to the foregoing language, the judgment orders appellant "to take all necessary steps to effect the retransfer of the real property back into his name . . . ." We

agree with the dissent that this portion of the judgment is problematic; we do not, however, believe it renders the judgment ineffectual.

The additional language at issue is both unnecessary and unwarranted.[2] The trial court declared the transfer fraudulent in the context of the Department's prior judgment against appellant; thus, the Department may proceed as if the transfer had never occurred. (*Strong v. Strong* (1943) 22 Cal.2d 540, 546-547; see also, Civ. Code, § 3439.07.) A "retransfer" is simply not necessary. Indeed, as far as the rest of the world is concerned, Julia and Carl own the Property, a fact inconsistent with the "retransfer" ordered by the judgment. Thus, for example, if proceeds from the Department's execution on the Property exceed the amount of the judgment lien, Carl and Julia, and not appellant, are entitled to receive those proceeds.

In addition to being unnecessary the language ordering "retransfer" of the Property is unwarranted because Julia and Carl's rights to the Property were not litigated. Thus the trial court ought not to have ordered appellant to attempt to divest his children of their interest in the Property. If they have a valid interest in the Property, they are free to protect that interest in a subsequent proceeding.[3]

Finally, we agree with the dissent that the trial court has considerable discretion to proceed without the presence of the transferees of the Property. We note, however, that appellant's only contention on appeal is that the trial court lacked jurisdiction to enter the judgment – he makes no claim that the court abused its discretion. The reason for this is

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[2] For this reason, we shall modify the judgment to delete this sentence.

[3] Code of Civil Procedure section 720.110 et seq. provides a means to do so. "A third person claiming ownership or the right to possession of property may make a third-party claim under this chapter in any of the following cases if the interest claimed is superior to the creditor's lien on the property: (a) Where real property has been levied upon under a writ of attachment or a writ of execution." (Code Civ. Proc., § 720.110.) As the dissent notes, in *Allee v. Shay*, *supra*, 92 Cal.App. 749, the fraudulent conveyance issue was litigated in the transferee's action to enjoin execution on the property in question.

obvious – he did not ask the trial court to exercise its discretion on this matter; thus, the court could not possibly have erred in that exercise. Had appellant raised the issue below, we would be required to consider whether the court's decision to proceed without Julia and Carl was an abuse of discretion for the reasons cited in the statute and case law. (See, Code Civ. Proc., § 389, subd. (b); *Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1343.) The issue is simply not presented to us in this appeal.

DISPOSITION

The judgment is modified to delete the following sentence: "Defendant Julio Olaco aka Julio O'Laco is to take all necessary steps to effect the retransfer of the real property back into his name on or before Jan. 16, 2006." As so modified, the judgment is affirmed. Costs of appeal are awarded to Respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, Acting P. J.

I concur:

KRIEGLER, J.

Sandra Shewry v. Julio O'Laco, etc.
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MOSK, J., Dissenting

I respectfully dissent.

This is a case against a transferor (defendant) for the fraudulent conveyance of property to his son and his daughter—the transferees. Inexplicably, the transferees, and holders of record title to, the property were both dismissed from the action by the plaintiff.[1] There is no showing of any lack of jurisdiction over the transferees.

The defendant asserts that the judgment is defective because of Code of Civil Procedure section 389, subdivision (a), which provides, "[a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

The defendant refers to the lack of an indispensable party as being "jurisdictional," even though the issue is no longer considered jurisdictional. Rather, the trial court, it is said, has the discretion to proceed without an indispensable party (*Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 365), although the requirement for joinder is referred to as "compulsory.") (*Id.* at p. 365, fn. 7.) The defendant clearly argues that in view of Code of Civil Procedure section 389, subdivision (a), and authorities, the trial

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[1] One of the transferees testified, and said he would like to be extracted from the situation. He noted he had been dismissed from the action. He had filed an answer.

court erred in rendering a judgment without the record owners of the property in question. The "shall" in Code of Civil Procedure section 389, subdivision (c) makes the provision mandatory, even if it is no longer "jurisdictional." (See *Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 357 [noting that trial court refused to set aside a conveyance because of cases holding transferee is an indispensable party in an action to declare a transfer void as fraudulent].)

The California Supreme Court stated as follows: "The term 'jurisdiction,' 'used continuously in a variety of situations, has so many different meanings that no single statement can be entirely satisfactory as a definition.' [Citation.] Essentially, jurisdictional errors are of two types. 'Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.' [Citation.] When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and 'thus vulnerable to direct or collateral attack at any time.' [Citation.] [¶] However, 'in its ordinary usage the phrase "lack of jurisdiction" is not limited to these fundamental situations.' [Citation.] It may also 'be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.' [Citation.] '"[W]hen a statute authorized [a] prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction."' [Citation.]" (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660-661.) Because the term "jurisdiction" has, according to our Supreme Court, a variety of meanings it can loosely be applied to defendant's position here.

Although specifying that the deed is void due to a fraudulent conveyance, the judgment goes on to provide that defendant "is to take all necessary steps to effect the retransfer of the real property back into his name on or before January 16, 2006." What that means and how it could be enforced is uncertain. Whatever steps defendant might take (does he have to sue), there is no indication he can compel retransfer. The

transferees have record title to the property and no apparent obligation to defendant with respect to the property. Thus, it is not apparent that he can take steps "necessary" to cause a retransfer from both transferees.[2] The majority properly ordered the deletion of that provision from the judgment.

Authorities in California admittedly refer to a fraudulent transfer as void so that the creditor may take steps to seize the property. Civil Code section 3439.07, subdivision (c)—part of the Uniform Fraudulent Transfer Act (Civ. Code, § 3439)—provides that, "If a creditor has obtained a judgment on a claim against the debtor, the creditor may levy execution on the asset transferred or its proceeds." The California Supreme Court stated that fraudulent conveyances "are void as against creditors" and that "[a] creditor may levy execution on the property as if there had been no conveyance." (*Strong v. Strong* (1943) 22 Cal.2d 540, 546-547; see also *Strangman v. Duke* (1956) 140 Cal.App.2d 185, 191.) But this principle does not answer the question of whether, in order to obtain an enforceable judgment of a fraudulent transfer, the transferee must be a party. Authorities suggest that the transferee must be a party. Justice Sullivan wrote, "[t]he transferees . . . are necessary parties defendant in an action to set aside a fraudulent conveyance. [Citations.]" (*T W M Homes, Inc. v. Atherwood Realty & Inv. Co.* (1963) 214 Cal.App.2d 826, 848.) Indeed, if all of the property has been conveyed, the transferor is not even a necessary party. (*Liuzza v. Bell* (1940) 40 Cal.App.2d 417, 424-425.) "The transferee . . . is a necessary party in an action to declare a transfer void as fraudulent." (*Heffernan v. Bennett & Armour* (1952) 110 Cal.App.2d 564, 586.)

More recent authorities under the Uniform Fraudulent Conveyance Act are consistent with California authorities. *Tanaka v. Nagata* (Haw. S.Ct. 1994) 868 P.2d 450, a decision by the Hawaii Supreme Court, is worth quoting at length. "Although there is no recent Hawaii authority expressly denominating the necessary parties to an

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2 In *Hansen v. Cramer* (1952) 39 Cal.2d 321, the transferee of the property was a party; *Allee v. Shay* (1928) 92 Cal.App. 749, the issue of the fraudulent conveyance was litigated in the transferee's action to enjoin execution on the property in question.

action to set aside an alleged fraudulent transfer, our territorial court noted that, in this jurisdiction, a transfer to defraud a creditor is void as to the creditor and the question whether the transfer was bona fide may be adjudicated in an action at law; in order to do so, however, it is clearly necessary to have the alleged fraudulent transferee before the court in order to bind him. *Hoffschlaeger Co. v. Jones*, 24 Haw. 74 (1917) (citations omitted). Although the statement regarding a transferee in *Hoffchaeger* is dictum, it is consistent with decisions from courts in other jurisdictions that have ruled that a grantee or transferee of property, who claims an interest therein, is a necessary and indispensable party to the resolution of a claim of fraudulent transfer. *See, e.g., Simmons v. Clark Equipment Credit Corp.*, 554 So. 2d 398, 399 (Ala. 1989) (grantee who retained title to property was necessary party to action by grantor's creditors to set aside conveyance as fraudulent); *T W M Homes, Inc. v. Atherwood Realty & Investment Co.,* 214 Cal. App. 2d 826, 848, 29 Cal. Rptr. 887, 899 (1963) (transferees were necessary party defendants in action to set aside fraudulent conveyance); *Guice v. Modica,* 337 So. 2d 302, 303 (La. App. 1976) (children to whom debtor made donation of property were indispensable parties to suit by creditor to nullify donation); *Mihajlovski v. Elfakir,* 135 Mich. App. 528, 534, 355 N.W.2d 264, 267 (1984) (presence of grantee who retains title to property was essential to permit court to render complete relief in action to set aside fraudulent conveyance); *Murray v. Murray,* 358 So. 2d 723, 725 (Miss. 1978) (grantee is necessary party in action to set aside fraudulent conveyance); *Dempsey & Spring, P.C. v. Ramsay,* 79 A.D.2d 1017, 1018, 435 N.Y.S.2d 336, 337 (1981) (trial court acted improperly in determining that defendant's conveyance of property to his daughter was fraudulent where no notice or opportunity to appeal was afforded to daughter, who was present owner of record); *Fraley Ins. Agency v. Johnston,* 784 P.2d 430 (Okl. App. 1989) (in action to set aside fraudulent conveyance or transfer of property, grantee or transferee claiming interest in subject property was necessary and indispensable to resolution of claim); *Becker v. Becker,* 138 Vt. 372, 380, 416 A.2d 156, 162 (1980) (transfer of property creates interest in grantee that made grantee necessary party to action for fraudulent conveyance, even though no fraud on grantee's part needed to be shown); *see*

also Kennedy, *Reception of the Uniform Fraudulent Transfer Act*, 43 S.C.L. Rev. 655, 673 (1992) (to avoid constitutional due process objections, any transferee or other claimant to property transferred or its proceeds should be party to any creditor's action that would affect claimant's rights in property).

"We agree with the authority cited above, reaffirm the dictum in *Hoffschaleger*, and hold that where a creditor alleges a fraudulent transfer of property from a judgment debtor to a transferee who retains title to the subject property or who claims an interest in the property or its proceeds, the transferee is a necessary party to any action seeking to set aside the transfer. Such an action for relief against a transfer alleged to be fraudulent should be brought pursuant to Hawaii Revised Statutes (HRS) ch. 651C (1985), *see supra* n.2, and should expressly name the alleged fraudulent transferees as defendants. Our holding is consistent with established Hawaii law regarding the naming of parties in property disputes. *Cf. Rossiter v. Rossiter*, 4 Haw. App. 333, 337, 666 P.2d 617, 620 (1983) (record owner of property was necessary and indispensable party to action affecting her interest in property, and family court had no jurisdiction to adjudicate questions affecting title to property where record owner not named as party). Fundamental principles of due process require that transferees who claim an interest in real property or its proceeds have a full and fair opportunity to contest claims of fraudulent transfer. Because the respondent resorted to an improper vehicle for establishing a fraudulent transfer, the order granting the respondent's motion to execute on fraudulently transferred asset must be vacated. (Fns. omitted.)" (*Id.* at p. 454; see also Spero, Fraudulent Transfers and Implications (2007) § 15.2 ["Normally, the transferor and transferee are jointed in the action. The transferee who still holds an interest in the property is an indispensable party. But the transferor/debtor may not be an indispensable party if it no longer holds an interest in the transferred property. (Fns. omitted.)"]; 26 COA 773 (2006) § 17 ["The transferee is a necessary party to an action to set aside a transfer under the state enactment of the uniform fraudulent transfer act if the transferee retains title to, or claims an interest in, the property transferred"].)

Civil Code section 3439.08 provides that a transfer is not voidable if the transferee took the property in good faith for a reasonably equivalent value. Surely, the transferee should have the opportunity of asserting this defense before the creditor of the transferor can levy upon the property.

This brings me back to the judgment here. The judgment does not purport to be one that allows the creditor to levy upon the property. After all, the judgment requires the defendant to take steps to obtain title to the property. Moreover, the judgment cannot collaterally estop the transferees if an action is brought against them because they were not parties to the action. (See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 388, p. 958 (Witkin).) Both of the transferees likely would not be deemed to be in privity with the transferor-defendant. (See *Lynch v. Glass* (1975) 44 Cal.App.3d 943; Witkin, *supra*, §§ 392-393, pp. 961-963.) One of them, the son, is a closer case because of his testimony. But there is no evidence regarding the daughter. The judgment's requirement that defendant obtain title to the property appears to be ineffectual and unenforceable because his specific duties cannot be ascertained (see *R.G. Hamilton Corp. v. Corum* (1933) 218 Cal. 92, 95).

As a consequence of the absent parties, "'a complete determination of the controversy'" was not made, and the trial court did not enter "'any effective judgment.'" (*Kaczorowski v. Mendocino County Bd. Of Supervisors* (2001) 88 Cal.App.4th 564, 568.) That there was no objection before the trial court does not foreclose consideration of the issue. (See *Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1343.) I realize that the trial court has considerable discretion to proceed without parties in appropriate cases. But here, I am concerned with the nature and apparent ineffectiveness of the judgment, the possible infringement on the rights of those not parties to this action, and the mandatory language of Code of Civil Procedure section 389, subdivision (a). The trial court must have recognized that it had a problem because it attempted to deal with it by providing that defendant had to take necessary steps to retrieve the transferred property—a term that will now be stricken.

The idea that the transferees can protect their rights in opposing a writ of execution is not realistic. And this is not even an argument made by plaintiff. Plaintiff notes it has already recorded its money judgment in Los Angeles County and thus claims a lien on the real property. That lien is ineffectual as against the property in which the sole record owners are transferees. The judgment declaring the transfer void in a proceeding in which the record owners were not parties is not sufficient to obtain rights in the property, much less insurable title. If plaintiff could get far enough to instigate an execution sale (it would have to arise out of the Sacramento action), the transferees theoretically could seek to enjoin any purported execution sale of the property (see Code Civ. Proc., § 720.110; see *Allee v. Shay* (1928) 92 Cal.App. 749 [under prior law, a proceeding in which fraudulent conveyance issue was litigated and the transferee was a party]) or appear when a court order is sought to sell the property at an execution sale, if the property qualifies as a dwelling in which defendant resides. (See Code Civ. Proc., § 704.740, subd. (a); see also Ahart, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2006) ¶ 6:756, p. 6D-95 [The purpose of this execution sale hearing of a real property dwelling is "to determine whether the dwelling is subject to the *homestead exemption*, and to ensure that the debtor is paid the amount of the exemption if the property is sold"].) Presumably, in such proceedings, the issue of fraudulent conveyance would have to be relitigated, unless the transferees could be barred by this judgment under a privity theory. Thus, there is the risk of inconsistent obligations. How the transferees might protect their interests begs the question of whether the judgment itself can be rendered without their appearance in the proceeding. (See *Regency Outdoor Advertising, Inc. v. Carolina Lanes, Inc.* (1995) 31 Cal.App.4th 1323, 1329 [purpose of statute giving third parties right to challenge execution sale is to provide remedy when property levied upon was "by mistake"].) That parties can somehow protect themselves against a judgment that should be reversed does not mean the judgment should not be reversed. This case is one in which the indispensable parties must be joined under Code of Civil Procedure section 389, subdivision (a). (See 1 Weil and Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) § 2:156, p. 2-42.)

I would reverse, but would not order dismissal. Rather, as suggested by plaintiff, the trial court should require the joinder of the indispensable parties.

MOSK, J.